Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend	)	MB Docket No. 10-71
The Commission's Rules Governing	)	MB Docket No. 07-198
Retransmission Consent	)	

To: The Commission

Comments of Morgan Murphy Media

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Summary

Morgan Murphy Media is concerned that adoption of the Petition's proposed changes to the retransmission consent process would unnecessarily and improperly tilt negotiating leverage in favor of Multichannel Video Programming Distributors ("MVPDs") to the detriment of consumers and of Commission policies favoring broadcast localism and programming diversity.

Morgan Murphy is a broadcaster in small-to-medium-sized markets who has negotiated hundreds of retransmission consent agreements with MVPDs. The availability of retransmission consent is vital to the viability of stations in small- to medium-sized markets in light of the high cost associated with providing local programming. The industry faces well-established financial challenges in this economic downturn, and increased competition in the markets for local video programming and advertising, including competition from MVPD systems, other nonbroadcast video and web-based new media. Retransmission consent fees help broadcasters obtain fair compensation for the value of their content and help offset the costs of creating high-quality programming. They also bring broadcasters into parity with MVPDs who charge fees to their subscribers directly and with other nonbroadcast video programming providers who negotiate fees for carriage on MVPD systems -- in both cases, fees that supplement advertising revenues.

The Petition's proposed reforms to the retransmission consent process should be rejected because the process works. In light of the delicate balance among the components of the retransmission consent regime, the FCC should reject calls to mandate compulsory arbitration or interim carriage. Broadcasters and MVPDs are subject to a statutory obligation to negotiate in good faith, and both sides have strong incentives to reach agreements. Negotiations may be contentious, but hard bargains do not form a basis for the Petition's requests for binding arbitration and interim carriage. In fact, Congress has sharply – and wisely – limited the Commission's authority to interfere in marketplace agreements, and very few complaints of bad faith have ever been filed with the Commission. The adoption of mandatory arbitration or interim carriage would result in uncertainty and delay in the resolution of carriage disputes. By their nature, arbitration proceedings are not quickly resolved given the volume of documentary and testimonial evidence that would likely be involved in cases involving multi-month carriage negotiations. Moreover, it would appear that any arbitration decision would have to include findings regarding whether the parties failed to negotiate in "good faith" – as set forth in the statute. Such efforts would be unnecessarily duplicate the Commission's complaint process. It is clear that the arbitration card would be played by MVPDs to game the process, leading to fewer negotiations being resolved privately.

In addition, the "reforms" set forth in the Petition would contradict federal policies to promote free over-the-air broadcasting and localism. They would increase the cost of retransmission consent to broadcasters, would introduce uncertainty and delay into the process and would divert scarce resources from localism efforts.

For these reasons, Morgan Murphy urges the Commission to reject the rule changes proposed in the Petition.

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Comments of Morgan Murphy Media

Morgan Murphy Media ("Morgan Murphy"),[1] by counsel, responds to the Public Notice ("Public Notice") issued by the Media Bureau in connection with a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent ("Petition").[2] Morgan Murphy submits these comments to ensure that the record in this proceeding reflects the perspective of a broadcaster in small-to-medium-sized markets who has negotiated hundreds of retransmission consent agreements with Multichannel Video Programming Distributors ("MVPDs"), including all of the multi-system operators, both satellite providers, numerous small cable companies and others. Morgan Murphy is concerned that adoption of the Petition would unnecessarily and improperly tilt negotiating leverage in favor of MVPDs to the detriment of consumers and of Commission policies favoring localism and programming diversity. As described herein, the current retransmission consent regime, particularly as applied to small-and-medium-sized markets, is effective, and it works.

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[1] Morgan Murphy Media includes: Television Wisconsin, Inc. (WISC-TV, Madison, WI), QueenB Radio Wisconsin, Inc. (WPVL[AM] & WPVL-FM, Platteville, WI; WGLR[AM] & WGLR-FM, Lancaster, WI; KIYX-FM, Sageville, IA), Spokane Television, Inc. (KXLY-TV, Spokane, WA); QueenB Radio, Inc. (KZZU-FM, Spokane, WA; KEZE-FM, Spokane, WA, KXLY[AM] & KXLY-FM, Spokane WA; KHTQ [FM], Hayden, ID; KVNI [AM], Coeur d'Alene, ID; KXLX[AM], Airway Heights, WA), Apple Valley Broadcasting, Inc. (KAPP[TV], Yakima, WA, KVEW[TV], Kennewick, WA), and QueenB Television, LLC (WKBT[TV], La Crosse, WI).

[2] Public Notice, *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (rel. March 19, 2010); *see also* Order, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (rel. April 2, 2010)(extending comment date until May 18, 2010 and reply comment date until June 3, 2010).

Background

Morgan Murphy is a leading broadcaster in small- and medium-sized markets in Washington, Wisconsin, Idaho and Iowa. The company has been family owned since its inception nearly 70 years ago. It is a small business whose CEO is a woman. Its stations are highly regarded for local service to its communities, and the company has a long-standing, demonstrable commitment to community service, to the presentation of diverse viewpoints and to localism. In fact, localism is the cornerstone of its business, similar to other broadcasters across the country.

As Morgan Murphy has noted in other Commission proceedings,[3] there are challenges in fulfilling each station's commitment to localism. The industry's financial, technological and competitive challenges are widely known and uncontroverted. Broadcasters – even network affiliates in markets much larger than those that Morgan Murphy serves – are slowly recovering from the aftershocks of several years of a difficult economy that resulted in job losses, in strained budgets and a collapse of the financial markets at a time broadcasters most need access to capital to remain viable. The soft advertising market has curtailed station revenues as competition for scarce advertising dollars has increased with the emergence of new media companies and other Internet-based services, as well as with cable advertising sales. Unlike cable and satellite providers, broadcasters rely on these revenues, not subscriber fees, to provide free over-the-air programming; yet cable and satellite increasingly compete for advertising revenues as an additional stream over and above subscriber revenues.

As competition has increased in the markets for video programming and advertising, stations also have dealt with other severe bottom-line pressures. Viewers today enjoy broadcast

[3] *See* Comments of Morgan Murphy Media filed April 28, 2008 in response to *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rule Making, MB Docket No. 07-218 (rel. Jan. 24, 2008).

programming with high-definition video and audio presentations of astonishing clarity. Efforts to convert stations to these digital transmissions have involved expensive, multi-year capital investments, and MVPDs have undoubtedly benefited due to these improvements in some of their most popular programming. Further, conversion of news rooms and other local video production to digital technologies is expensive and for many stations, an ongoing drain on revenues. These costs have dramatically intensified the economic pressures associated with local broadcasting in recent years.

Despite these challenges, broadcasters continue to fulfill a critical role in the industry by providing programming that is compelling, popular and, most importantly, *local.* In this context, retransmission consent fees are vital to the ongoing viability of many broadcast stations. Retransmission consent fees help broadcasters obtain fair compensation for the value of the content that broadcasters provide for consumers. They help offset the costs of creating high-quality programming, and they bring two measures of parity – first, parity to MVPDs who charge fees to their subscribers directly and second, parity to other nonbroadcast video programming providers who negotiate fees for carriage on MVPD systems. The fees charged by these MVPDs and other nonbroadcast video programming providers are *in addition to* the advertising revenue they collect as they compete with broadcasters. Retransmission consent is especially important in small-to-medium-sized markets, where the small available advertising revenue is subject to growing levels of competition from MVPD systems, other nonbroadcast video and web-based new media.

Retransmission consent also promotes local service to broadcasters' audiences. As the Commission reported to Congress, the individual rules governing retransmission consent, network nonduplication, syndicated exclusivity and sports blackouts are "part of a mosaic of

other regulatory and statutory provisions ... to implement key policy goals." [4] Among other things, they promote localism by preventing MVPDs from undermining local broadcasting via the importation of distant network signals from stations with no geographic nexus with the community being served. Time and again, the Commission has reiterated the importance of broadcast localism as a Commission policy goal. Localism and retransmission consent have been and will remain inexorably intertwined. Regulatory efforts to undermine the latter will undermine the former.

The marketplace for retransmission consent *works*. Broadcasters and MVPDs are prohibited from failing to negotiate in good faith for retransmission consent.[5] Parties are required to comply with several objective negotiation standards set forth in the Commission's rules,[6] and either side can file a complaint with the Commission that alleges that the other side breached its duty to negotiate retransmission consent in good faith. Negotiations occur at the local level, so they are narrowly tailored to the individual facts and circumstances of the community. Negotiations can be contentious in any marketplace, but the vast majority of retransmission consent negotiations proceed smoothly without any service interruptions to consumers or the need to resort to complaints to the Commission. In this regard, Congress clearly – and wisely – chose not to "dictate the outcome of the ensuing marketplace negotiations" and carved a narrow role for the Commission to intervene in such negotiations.[7] The statute makes clear that private parties are in the best position to resolve their disputes,

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[4] Report to Congress, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (rel. Sept. 8, 2005)("2005 Report") at 18.
[5] 47 C.F.R. §76.65.
[6] 47 C.F.R. §76.65(b)(1).
[7] *See, e.g., Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445, 5450 (2000)(emphasis removed) ("Good Faith Order") (noting that Congress did not intend to subject retransmission consent to detailed substantive Commission oversight) at ¶13, *recon. granted in part*, 16 FCC Rcd 15599 (2001).

particularly where both parties have the strong incentives to reach agreements and to ensure continuity of video programming service.[8]

Historically, the marketplace for retransmission consent has proven beneficial for MVPDs. Since the adoption of the 1992 Cable Act,[9] time and again, local cable systems refused to provide cash consideration for retransmission of Morgan Murphy stations. These cable systems wielded market power aggressively, to the detriment of consumers, by refusing to provide the stations other than in-kind consideration, despite the high costs associated with the provision of such programming and the fact that such programming was being re-packaged for a fee by MVPDs. Only with the introduction of new competition from satellite providers did MVPDs yield to the marketplace realities and begin making payments for the popular broadcast content that drives the value of their video programming service. Thus, for many years, cable operators benefitted from a retransmission consent system that, then as now, operated with an emphasis on marketplace solutions over regulatory fiat.

Nevertheless, the Petitioners – many of whom are MVPDs – ask the FCC to change the system and the good-faith negotiation standards in the rules.[10] For example, they have requested changes in the existing dispute resolution framework such that parties would be required to submit to "compulsory arbitration, an expert tribunal or similar mechanisms."[11] Broadcasters would be required to grant mandatory interim carriage while an MVPD negotiates "in good

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[8] 2005 Report at 24.
[9] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).
[10] Petition for Rulemaking to Amend the Commission's Rules Regarding Retransmission Consent (filed Mar. 9, 2010) by Public Knowledge; DIRECTV, Inc.; DISH Network, LLC; Charter Communications, Inc.; American Cable Association; New America Foundation; OPASTCO; Time Warner Cable, Inc.; Verizon; Cablevision Systems Corp.; Mediacom Communications Corp.; Bright House Networks, LLC; Insight Communications Company, Inc.; and Suddenlink Communications ("Petition").
[11] Petition at 32-33.

faith" or while a retransmission consent dispute is "pending."[12] Their recurring theme is that broadcasters have employed purportedly "abusive" negotiation practices in the marketplace for retransmission consent.

Not surprisingly, the Petitioners say nothing about the abusive practices that MVPDs have employed when they have had leverage in retransmission consent negotiations. For example, Morgan Murphy can report from its experience with MVPDs that some MVPDs have sought, via a retransmission consent agreement, rights to:

- retransmit a station outside the station's Designated Market Area ("DMA"), despite other station's network nonduplication protection;
- automatically apply the terms of a retransmission consent agreement to an "after-acquired" MVPD's system, irrespective of whether the system serves the station's DMA or of other local or marketplace considerations;
- circumvent the compulsory licensing system by granting a private copyright license, thus requiring the broadcaster to separately obtain all copyrights to their programming stream and allowing the MVPD to avoid making copyright royalty payments;
- obtain exclusive rights to any fee-based content;
- exert significant editorial control by eliminating the obligation to pay or to carry the station's programming if that programming changes; and
- "cherry pick" the multicast programming streams to be retransmitted, thereby foreclosing carriage of streams that have local news and public affairs programming.

Yet despite these efforts by MVPDs, Morgan Murphy has successfully negotiated retransmission consent for each cycle because the process works. As described below, negotiations should be expected to involve significant give and take, and the current process allows parties to work through their differences without need to resort to an FCC "referee" except in the most egregious, bad-faith circumstances.

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[12] *Id.* at 35-40.

Argument

I. THE EXISTING DISPUTE RESOLUTION FRAMEWORK SHOULD BE RETAINED BECAUSE IT WORKS

The Commission should reject the Petitioners' proposed changes to the dispute resolution framework. The Petitioners attempt to justify their preferred relief by citing three concerns: 1) "protecting" consumers from "unreasonable rates" associated with an MVPD's decisions to raise subscriber rates to fund retransmission consent fees, 2) prohibiting broadcasters from "tying" retransmission consent to negotiations for carriage of other program services and 3) the lack of interim carriage while retransmission consent disputes are pending.[13] None of these concerns justify such transparent efforts for MVPDs to gain marketplace leverage through governmental fiat.

For some of the Petitioners, the Petition rehashes arguments made to the Commission as recently as five years ago. For example, with regard to "interim" carriage, the Commission in 2005 rejected calls to prohibit broadcasters from withdrawing consent while negotiations were pending or during the pendency of a good faith or exclusivity complaint, finding that based on "the express language [of the statute], we see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission."[14] Similarly, certain MVPDs in 2005 sought mandatory arbitration protections for retransmission consent based on the Fox/DirecTV merger model, irrespective of the fact that this specific merger condition was designed to prevent NewsCorp from discriminating against

[13] Petition at 31-40.
[14] Good Faith Order at ¶60.

other competing MVPDs – a potential abuse not present in other retransmission consent negotiations.[15]

Nevertheless, broadcasters should be entitled to negotiate for compensation for their efforts to create programming and to preserve free over-the-air broadcasting. Retransmission consent negotiations are marketplace driven. In the 1992 Cable Act, Congress built a statutory foundation for a marketplace for retransmission consent in the wake of cable's efforts to compete with broadcasters for advertising revenues. The foundation preserves and promotes localism, and it spurs competition in the marketplace for video programming. Congress recognized that the Commission's role in retransmission consent negotiations should be heavily circumscribed, and even now, the Commission should continue to leave dispute resolution to the parties in all but the most egregious cases of bad faith.

The Petitioners paint the broadcasting industry as a collection of competitive powerhouses who wield market power to hold MVPDs hostage in retransmission consent negotiations and generate windfall profits.[16] Yet, as Morgan Murphy can attest, many retransmission consent disputes involve stations in small- to medium-sized markets where the cable or satellite operator holds the market power, even against network-affiliated stations. Such MVPDs even have better knowledge of the marketplace by virtue of the fact that they know what other broadcasters are being paid and broadcasters have no such knowledge. The Petitioners' broad-brush approach glosses over the realities of these markets, where MVPDs have greater negotiating leverage. Not every retransmission consent dispute pits a large broadcasting company against a large MVPD; thus, adoption of "one-size-fits-all" national rules, such as those proposed by the Petitioners, would ignore the particular facts and circumstances that apply in

[15] *See* Reply Comments of NAB at 28-29 in Docket No. 08-29.
[16] *See, e.g.*, Petition at 18-20.

local markets, to the detriment of local small broadcast businesses. In fact, as others have noted,[17] of the hundreds of broadcast TV stations in the country, very few bad-faith complaints have been filed with the FCC.

The Petitioners also disingenuously describe broadcasters as "*insulated* ... from market forces."[18] Retransmission consent is, of course, a creature of the 1992 Cable Act and, absent the protections of the statute, MVPDs would have little incentive to compensate broadcasters for retransmission because broadcasters would not have the option to request mandatory carriage. As noted above, retransmission consent is provided in the context of marketplace negotiations in support of federal policy promoting localism and free over-the-air broadcasting, and the retransmission consent/must carry regime exists to satisfy those policy goals that would be undermined if left solely to market forces. If anything, MVPDs clearly have a problem with the Commission's policy of preserving free over-the-air broadcasting that offers local programming because such services clearly stand in competition to the subscription packages that MVPDs want to sell. Furthermore, the rules for syndicated exclusivity and network nonduplication exist not to deter competition but to give primacy to localism over the importation of distant signals, again in furtherance of federal policy. Enforcing these exclusivity rights is fundamental to the preservation of localism and the provision of local news, weather, emergency information and other local content.

While the Petitioners accuse broadcasters of making threats to withdraw popular programming as a means of extracting retransmission consent fees, they make such accusations without acknowledging the facts. Denial of carriage is a *bona fide* "last resort" for broadcasters. Both sides have strong incentives to reach agreement because the loss of broadcast programming

[17] See Comments of the National Association of Broadcasters in *Inquiry Regarding the Impact of Certain Rules on Competition in the Multichannel Video Programming Distribution Market*, MB Docket No. 05-28 at 20.
[18] Petition at 7.

on cable and satellite hurts broadcasters as well as MVPDs. Such denials undermine localism and good-faith with the community, so they operate as powerful incentives to make deals. The Petitioners' stated concerns that retransmission consent contributes to "unreasonable rates" is a red herring.

In light of the delicate balance among the components of the retransmission consent regime, the FCC should reject calls to mandate compulsory arbitration or interim carriage. As the Commission has acknowledged, Congress has clearly limited the FCC's role in retransmission consent negotiations by establishing a paradigm of marketplace-guided negotiations where the Commission is authorized to intervene only in egregious cases. The legislative history, the rules and experience all point in the same direction – private negotiations are the key to resolving such disputes.

The unintended consequence of mandatory arbitration, even assuming *arguendo* that the Commission has the statutory authority to adopt such a mandate, is a *delay* in resolution among the parties. By their nature, arbitration proceedings are not quickly resolved given the volume of documentary and testimonial evidence that would likely be involved in cases involving multi-month carriage negotiations. Moreover, it would appear that any arbitration decision would have to include findings regarding whether the parties failed to negotiate in "good faith" – as set forth in the statute. Such efforts would be unnecessarily duplicative of the Commission's complaint process. It is clear that the arbitration card would be played by MVPDs to game the process, leading to fewer negotiations being resolved privately.

If the Commission were to issue a rule mandating interim carriage based solely on an MVPD "continuing to negotiate in good faith," doing so would essentially nullify the broadcaster's consent rights. Mandatory interim carriage removes the MVPD's incentive to

work toward a quick resolution of a retransmission consent dispute because the MVPD would have the comfort of knowing that they could perpetuate the *status quo* of carriage and unilaterally extend out-dated contractual terms. In fact, it is statutory deadlines and the risk of withheld consent that encourage quick resolutions of carriage disputes, and the MVPDs apparently would prefer to string things out indefinitely.

With respect to so-called "brinksmanship" of broadcasters, it is clear that most MVPDs' objections regarding negotiation practices can be addressed by the Commission's "good faith" standards and by the existing complaint process. MVPDs may be unhappy with their track record in complaints before the Commission, but in light of the statutory scheme that reserves Commission action for only the most extreme situations, all parties should enter into negotiations with the understanding that, as in any other commercial enterprise, the negotiations may at times be contentious. To the extent that objections rise to the level of a violation of the good faith standards, they should be decided by the Commission, not by an arbitrator or by ill-fitting national standards.

The Petitioners also seek a rule amendment dictating that it is a *per se* violation of a broadcaster's good-faith negotiating duties to insist on tying retransmission consent to negotiations for carriage of "other programming services" and that any mechanism for resolving retransmission consent disputes will involve "only stand-alone agreements for the broadcast signal."[19] This proposed amendment should be rejected. Morgan Murphy cannot speak to the Petitioners' concerns about carriage of non-local cable programming, but Morgan Murphy's experience in negotiating carriage of its stations' multicast channels – which are part of the "broadcast signal" – is revealing. It has been difficult for Morgan Murphy stations to obtain MVPD carriage of additional program services that promote local news, public affairs, sports

[19] Petition at 35.

and entertainment programming. Such programming would contribute to diversity in the provision of programming, if only it were carried on MVPD systems. The Petitioners fail to explain what would count as "other programming services," but to the extent the Petitioners would propose to use this rule to bar broadcasters from seeking carriage of multicast channels, the proposed rule amendment must be rejected as inconsistent with federal localism policies.

II. ADOPTION OF THE PETITION WOULD ADVERSELY AFFECT BROADCAST LOCALISM

It bears repeating – broadcasters have spent tremendous sums to facilitate the transition to DTV operations and to provide valuable and much-needed local news and public affairs programming. Even as the DTV transition opened new possibilities for broadcasters to serve the public interest – for example, through multicasting and mobile video applications – the fact remains that the transition was an expensive unfunded mandate. Moreover, a station's localism obligations under federal law are significant, and the impact is disproportionately borne by stations in small- to medium-sized markets. In addition, there is an ongoing proceeding where the Commission is considering imposing new regulatory mandates and obligations,[20] imposing new costs on broadcasters. While MVPDs complain about retransmission consent fees to support such efforts, it is significant that MVPDs get the benefits of such programming (through satisfied cable customers) without having to provide local programming themselves. The "reforms" set forth in the Petition would contradict federal policies to promote free over-the-air broadcasting and localism. They would increase the cost of retransmission consent to broadcasters, would introduce uncertainty and delay into the process and would divert scarce resources from localism efforts.

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[20] *Broadcast Localism, Report on Broadcast Localism and Notice of Proposed Rulemaking*, MB Docket No. 04-233 (rel. Jan. 24, 2008).

Conclusion

For the above-stated reasons, Morgan Murphy urges the Commission to reject the Petition, which represents merely an attempt to give MVPDs additional unwarranted negotiating leverage in the marketplace for retransmission consent, in contradiction to federal policies to promote free over-the-air broadcasting and local programming. These proposals are not justified by marketplace failures, changed circumstances or any other grounds and would have a pronounced negative impact on consumers in the small-to-medium sized markets such as those served by Morgan Murphy.

Respectfully submitted,

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